Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

No. 78-335

vs.

ROBERT LAFONTAINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RONALD REOSTI (P 19368)

Attorney for Respondent

REOSTI & PAPAKHIAN

658 Pallister
Detroit, MI 48202
(313) 875-9800

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S. E.
GRAND RAPIDS, MICHIGAN 49503 — TELEPHONE 458-5326

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Counter-Statement of Questions Presented	1
Statutory Provision Involved	2
Statement of the Case	2
Argument —	
A. This petition amounts to a collateral attack on *Cole* for which cert. has already been denied	4
B. The Court of Appeals properly applied 45 USC (First) (j) to the Public Law Board	5
C. Petitioner's Argument that the Notice provision was complied with is erroneous	13
Conclusion	18
Appendix —	
45 U.S.C. 153 (Second)	(A1)

TABLE OF AUTHORITIES

Cases

	Page
Andrews v *L & N Ry.*, 406 US 320 (1972)	12
Brotherhood of Locomotive Engineers v *Denver & Rio Grande Ry.*, 411 F2d 1115 (10th Cir., 1969)	7
B.L.E. v *U.T.U.*, 471 F2d 8 (6th Cir., 1972)	12
BRT v *Chic. River & Ind. Ry. Co.*, 353 US 30 (1957)	7
Brotherhood of RR Tr. v *Jacksonville Tenn.*, 394 US 369 (1969)	12
Cole v *Erie-Lackawanna Ry. Co.*, 541 F2d 528 (6th Cir., 1976) Cert. den. 433 US 914 (1977)	passim
Durham v *US*, 401 US 481 (1971)	4
Elgin J. & E. Ry. v *Burley*, 325 US 711 (1945)	passim
Elgin J. & E. Ry. v *Burley*, 327 US 661 (1946)	passim
Employees' Protective Assn. v *N & W Ry.*, 511 F2d, 1040 (4th Cir., 1975)	7
Kotakis v *Elgin J & E Ry.*, 520 F2d 570 (7th Cir.) cert. den. 423 US 1016 (1975)	13, 16, 17
LaFontaine v *C & O Ry. Co.*, see A1 and A2 of Petioner's Brief	passim
People v *Jesse Flatt*, unreported (Wayne County Circuit Court, 12/14/71)	3
Pyzynski v *NY Central Ry. Co.*, 421 F2d 854 (2d Cir., 1970)	12
State of Md. v *Baltimore Radio Show*, 338 US 912 (1950)	4
Transportation-Communication Div. v *St. Louis and S. F. Ry.*, 419 F2d 933 (8th Cir., 1969) Cert den. 400 US 818 (1970)	7

TABLE OF AUTHORITIES (CONT'D)

	Page
US v *Shubert*, 348 US 222 (1955)	4
UTU v *Indiana HBR Co.*, 540 F2d 861 (7th Cir., 1976)	7
Vaca v *Sipes*, 386 US 1971 (1967)	12

Statutes

Public Law 89.456.80 Stat. §208 (1966), 1966 USCCAN 2285-2288	6, 8, 10
45 USC 153 (First) (j)	passim
45 USC 153 (Second)	2, 5

Other Authorities

Supreme Court Rule 19(b)	4
Seidenberg, "Grievance Adjustment in the Railroad Industry," in *The R.L.A. at Fifty*, pp. 209-250 (NMB, 1977)	8, 9, 11, 15

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

ROBERT LAFONTAINE,
Respondent.

No. 78-335

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Chesapeake & Ohio Railway Company, Defendant below, petitioned this Court for a writ of certiorari in the above-titled matter on August 24, 1978. This is respondent's Robert LaFontaine, brief in opposition to said petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

First, whether the notice provision of 45 USC 153 (First) (j) applies to a Public Law Board convened pursuant to 45 USC 153 (Second)?

Respondent contends the answer is yes, and further, that no reason exists to grant certiorari over this issue.

Second, assuming said notice provisions do apply to Public Law Boards, did respondent herein receive sufficient notice when he specifically requested to appear to represent himself and present witnesses, was not given actual notice of hearing, if any was held, and was prejudiced by said failure to notify?

Respondent answers no and states further that there is no reason to grant certiorari, herein.

STATUTORY PROVISION INVOLVED

Aside from those mentioned in petitioner's brief, respondent cites 45 USC 153 (Second) included in the appendix.

STATEMENT OF THE CASE

This case arises under the Railway Labor Act's provisions for settling minor disputes. 45 USC 153, (First) and (Second).

On April 26, 1971, respondent was stabbed by one Jesse Flatt while working at petitioner. Both respondent and Flatt were employees of petitioner. Respondent spent two months in the hospital as a result of said attack.

Petitioner discharged both Flatt and respondent, while respondent was hospitalized. Both men protested, claiming the other was the aggressor.

In accordance with the collective bargaining agreement a grievance hearing ("investigation") was held by the trainmaster on June 22, 1971. These hearings are required in all discipline cases and are conducted before a stenographer who transcribes the proceedings.

The investigation conducted in the respondent's case involved the discharges of both respondent and his assailant, Flatt. In fact, the same Union representative represented both LaFontaine and Flatt at the hearing. (4a, 21a, 49a, 50a, 57a)* Mr. Lewis who was a friend of Flatt's, introduced witnesses prejudicial to respondent. Following these witnesses, respondent discharged Lewis and sought to represent himself. (21a, 49a, 57a) The respondent sought a continuance to better prepare his case, and to introduce his own witnesses. His request was denied.

Respondent then asked Mr. Wojtaszak, General Chairman, United Transportation Union, to submit his case to the appropriate board, and insisted that the irregularities at the investigation be included in his appeal. (58a) Thereafter respondent asked Wojtaszak several times to inform him when the hearing before the Public Law Board would be heard so that he could present his own case. (48a, 49a) Mr. Wojtaszak promised that notice would be given. (48a) It is uncontradicted that respondent never received notice. (46a, 49a, 50a)

The Union's submission to the Board was based on the investigation transcript, but did not challenge the fairness of the investigation or the Union's conduct, as respondent had wished to do. (17a, 21a)

On December 14, 1971, Mr. Flatt was convicted of felonious assault in the State of Michigan's Circuit Court for Wayne County. (*People* v *Jesse Flatt,* unreported)

Following the Board's Award of January 23, 1972, upholding his discharge respondent filed this cause.

Petitioner states, at page 6 of its brief, that:

> "Plaintiff authorized his union United Transportation Union) to handle the appeal to Public Law Board

---

* Numbers in parentheses followed by the letter "a" refer to the joint appendix filed with the 6th Circuit.

347, and was aware of the fact that L. J. Wojtaszak, General Chairman, UTU, was handling the appeal of Plaintiff's grievance to Public Law Board 347."

Petitioner goes on to say that Article 44 of the UTU Constitution authorized the Union to act on respondent's behalf, and that said authority was never revoked. Petitioner's brief at page 7 (see also Page 8). In fact, Respondent did not authorize the UTU to act for him. He told Mr. Wojtaszak he wanted to appear to present his case to the PLB, and Wojtaszak agreed to such a procedure. Respondent did revoke the UTU's authority, if such authority ever existed. In fact, respondent dismissed his Union representative. Petitioner's conclusory statements that the UTU was authorized are not supported by the record. In fact, the Union was not so authorized.

ARGUMENT

A. This Petition amounts to a collateral attack on *Cole* v *Erie-Lackawanna Ry.*, F2d (6th Cir., 1976) for which cert. has already been denied.

This Court denied certiorari in *Cole, supra* at 433 US 914 (1977). It is clear from Petitioner's brief that the present petition for certiorari is little more than a belated attack on *Cole*. While a denial of the writ is not an expression on the merits, *US* v *Shubert*, 348 US 222 (1955), it is an expression that fewer than four members of the Court felt certiorari should be granted. *State of Maryland* v *Baltimore Radio Show*, 338 US 912 (1950). While said denials are discretionary, *Durham* v *US*, 401 US 481 (1971), Supreme Court Rule 19(b) sets forth the factors the Court weighs in considering a petition. Those factors are whether the circuits are in conflict; whether a circuit opinion conflicts with this Court; whether the issue is so important that the Court should review it; whether the circuit conflicts with state or territorial law; or whether this court should exercise its supervisory powers. In *Cole*, this Court already decided that the petition does not meet these criteria. While it is not a decision on the merits, it does suggest certiorari is improper.

Petitioner has failed to advance any reasons why the present petition is more meritorious than the petition in *Cole*. In fact, Petitioner has basically argued in the introduction to its brief in support of the instant petition that it is the *Cole* case which presents an issue of such importance as to warrant certiorari. Respondent can discern no other reason advanced by Petitioner as to why the instant petition should be granted.

B. 45 USC 153 (First)(j) is applicable to cases presented to Public Law Boards.

Petitioner's basic thrust in its petition is to reverse the decision of the Sixth Circuit in *Cole* v *Erie-Lackawanna Ry. Co.*, 541 F2d 528 (1976), which held that "Section 153 (First)(j) applies to proceedings before Special Adjustment Boards" *supra* at 533.

This section of the Act provides that employees have the right to appear before the NRAB in person or by their representative and to receive notice of the hearing. *Elgin J & E* v *Burley*, 325 US 711, 736-741 (1945 — hereinafter referred to as *Burley I*).

Petitioner seeks nothing less than to exclude employees from hearings before the Special Adjustment Boards. Petitioner argues that 45 USC 153 (second) that created the special adjustment boards made the unions the sole and

exclusive representative of employees in cases before these boards. *Petitioner's Brief,* pp. 16 and 18.

Admittedly, Petitioner has argued that under the facts of this particular case, the notice provided the union satisfied 45 USC §153 (First)(j) and *Elgin J & E Ry.* v *Burley,* 327 U.S. 661 (1946) (hereinafter *Burley II*). However, this argument is clearly secondary to its central thrust; i.e., to make the Union the sole and exclusive representative of employees in cases before the Public Law Boards or Special Adjustment Boards.

This argument is clearly unfounded. Petitioner's interpretation of the purpose and nature of the Public Law Boards can find no support in judicial authority nor in logic. Clearly as stated above, this petition does not warrant the grant of certiorari. In fact, the *Burley (I)* Court, *supra* at 722-734, notes that Congress decided that the Union is not the exclusive representative for employees in minor disputes in the Railroad industry. Thus Petitioner presents an issue clearly laid to rest in 1945.

The Public Law Boards were established by the 1966 Amendments to the Railway Labor Act. The legislative history clearly indicates that judicial review of NRAB and PLB decisions is identical, and includes review of the statutory requirements. That history says:

> "The bill provides for the establishment, upon the request of a representative of management or of labor, of special boards for the settlement of disputes arising under collective bargaining agreements in the railroad industry. The bill also provides that judicial review of orders of the National Railroad Adjustment Board, and of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation — whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal."
>
> P.L. 89-456, Leg. Hist., 1966 USCCAN 2285 at 2289.

The holding in *Cole, supra* is supported by this history; for an award of the NRAB is enforcible only if the procedural safeguard of notice was followed. 45 USC 153 (First)(j); *Elgin J & E Ry.* v *Burley,* 325 US 711, 738 (1945) (hereinafter *Burley I*); *Elgin J & E Ry.* v *Burley,* 327 US 661 (1946) (hereinafter *Burley II*).

Other case law also supports this position. Several Courts have held that the Court's jurisdiction to review an award of a PLB is identical to its jurisdiction to review an NRAB award. *Brotherhood of Locomotive Engineers* v *Denver & Rio Grande Ry.,* 411 F2d 1115 (10th Cir., 1969); *Transportation-Communication Div.* v *St. Louis & S. F. Ry.,* 419 F2d 933 (8th Cir., 1969), cert. denied, 400 US 818 (1970); *Employees Protective Assn.* v *N. & W. Ry.,* 511 F2d 1040 (4th Cir., 1975); *UTU* v *Indiana HBR Co.,* 540 F2d 861 (7th Cir., 1976); *Cole, supra.*

Furthermore, the NRAB is a compulsory arbitration scheme. *BRT* v *Chic. River & Ind. Ry. Co.,* 353 US 30, 77 S. Ct. 635 (1957). The same is true of a PLB. It is only proper then, that Courts apply the same standard of review in both forums.

The legislative history, and case law are clear. The Section 153 (First)(j) right to notice and appearance applies to a PLB in the same manner and to the same extent that they apply in cases heard by the NRAB.

Petitioner argues that applying the notice and appearance rights to a PLB would frustrate the Congressional purpose to establish an expeditious hearing. There are several responses to this argument.

First, Petitioner's argument, if accepted as the law, gives an individual employee a choice. Either go to the NRAB where he or she may exercise the right of appearance, or agree to a PLB where he or she might get a decision faster, but without a right to appear. In short, the choice is between participation and speed. There is no indication that Congress intended such a choice. Indeed, Congress opted for both, setting up a mechanism to get a decision faster, and including judicial review which insures the right of appearance. See *infra* at p. 6-7. For this reason alone, Petitioner's argument that the Sixth Circuit misconceives the purpose of a PLB is erroneous.

In fact, the misconception is petitioner's notion that the employee's right to appear on his own behalf conflicts with the need for a swift decision. Historically, when the PLB's were added as grievance adjustment mechanisms in 1966, Congress was concerned over the backlog on the NRAB's docket. However, the notice and appearance provisions were never cited as causes of this backlog. 1966 USCCAN 285-8. In fact, very few workers chose to exercise those individual rights. *Seidenberg,* "Grievance Adjustment in the Railroad Industry," in *The R.L.A. at Fifty,* pp. 209-250 (NMB, 1977). Furthermore, Congressional concern over the NRAB backlog focused on two of the four divisions of the NRAB. The first division had a huge problem. Cases were not decided until *seven or more years* after they were filed. *Seidenberg, supra;* PL 89-456, *supra,* But the problems there were not related to notice. In fact, the second and fourth divisions operated under the notice provisions and had almost no backlog. If notice were the culprit one might expect Congress to discover that fact, and simply delete Section 153 (First)(j). Notice and appearance rights did not cause a backlog in two divisions, and were not complained of in the other divisions.

It is unlikely that the appearance right will cause such a problem today. We note that petitioner puts forward no data to show what sort of delay, if any, notice and appearance rights cause. They have not done so because their argument is mere sophistry.

The PLB's have successfully shortened the time lag from a pre-1966 seven years to one and a half years presently, despite a case load that almost tripled. *Seidenberg, supra.* This success is due to the proliferation of PLB's. There are over 450 today. *Seidenberg, supra.* Their success is also due to the National Mediation Board's docketing rules which require that a list of cases be attached to the letter requesting the establishment of a PLB. No cases may be added to the original list, and as soon as the list is completed, the PLB is dissolved. If more claims arise a new PLB is created. Thus a backlog before any one PLB is virtually impossible.

The key to this success, as petitioner has pointed out, is the right of the union to decide which cases go to the PLB. As a result, the union can screen frivolous cases. Petitioner implies that the application of §153 (First)(j) would compromise this success. This argument is simply irrational. The fact that an employee has a right to appear at a hearing cannot possibly bear any relationship to the union's right to delete frivolous cases from the PLB's dockets.

Finally, *Burley I* dealt with this time lag argument. The Court there writes:

> "If, moreover, as petitioner urges, this [Notice and participation of the individual] may make settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amount-

> ing to more than mere protest in the settlement of claims arising out of his employment." *Burley (I), supra,* at 740-741.

This court has clearly opted for notice, despite any delay the notice might cause. At any rate, the fear of delay is unfounded.

Petitioner also argues that since a PLB can be convened only by a Union or carrier, that somehow, it follows, that Congress meant to exclude the individual employee from the grievance process. However, Congress gives a very clear statement of its intent in giving Unions the power to convene a PLB, but not giving employees that power. Congress intended Unions to screen the claims and file only those that had some validity. 1966 USCCAN 2287. There is no indication that once the Union feels a claim is valid, and demands a PLB for it, that the employee loses his personal right to notice and participation. In fact, as stated before, the opposite is true. Congress intended Court review of PLB's to be identical to that of the NRAB. Thus the notice provision clearly applies, and the fact that the Union convened it does not remove individual rights. It would be anamalous to hold that where a Union found a claim valid and convened a PLB the employee could get no notice; whereas, if the Union found no validity and the employee went to the NRAB, Section 153 (First)(j) applies.

Either the Union or the individual grievant can appeal to the NRAB. If the Union files, the NRAB still has to protect the employee and give him notice and the right to appear. The facts in Burley were that the Union filed; yet the court required notice to the employee. If Union filing to give the NRAB jurisdiction does not destroy individual rights, then we see no reason Union convening of a PLB does so. See *Burley (I), supra* at 744, 746, n. 3. The statistics cited by petitioner are instructive. PLB's handle the vast majority of claims, today. To hold that no notice need be given by them would drastically affect an employee's statutory rights. In fact, it would repeal §153 (First)(j). *Seidenberg, supra* at 237.

Were petitioner's position that the Union may convene a PLB and then refuse to allow a claimant access, while also failing to tell claimant of his NRAB Section (j) rights, adopted, the distinction Congress has drawn between major and minor disputes would disappear. The Union would become a member's exclusive agent in both. This position is in direct conflict with the RLA and Congress's intent. *Burley (I), supra,* 722-723.

In the case at bar the need for notice to an individual is clear. The Union representative tried to represent both members. One was the assailant — Flatt. The other was innocent — LaFontaine. Yet the Union presented a case that made LaFontaine the villain, and then failed to challenge that case before the PLB despite LaFontaine's repeated demand for notice, and the opportunity to represent himself. In fact, respondent discharged his Union representative.

The Kafkaesque nature of this process is startling. Claimant had no way of knowing which of the 400 or more PLB's had docketed his case, unless the Union or PLB or carrier gave him notice. He could not contact the Judge who was to decide his case because he did not know who the Judge was. No one gave him notice. He could therefore not present the facts as he knew them. His discharge was upheld. It is at least possible, if not probable, that had he had notice and been able to represent himself, he would be back to work today. Notice is a crucial right in such a situation; and §153 (First)(j) must apply.

In fact, *Burley (I)* suggests that a Union's interest in a grievance may not always be co-extensive with the individ-

ual's. In some claims, such as the case at bar, the grievance affects the collective agreement tangentially at best and the Union has less interest than the employee in pursuing the matter. *Burley (I), supra* at 736. That is true here. For a truly adverse hearing to take place, the employee's participation is necessary. The Union's participation is likely to be half-hearted since the collective agreement is not directly threatened. Further, *Burley (I).* points out that in some cases the Union's interest will be adverse to the employee's. To some degree that is true here. The Union had to choose between two members involved in a fight. It chose Flatt, because of his friendship with Lewis, the Union representative. Lewis purported to represent both parties. Notice would have allowed respondent to present his problem to the PLB.

This is especially true since a 301 suit (29 USC 183) against the Union for failure to fairly represent respondent is precluded. *Brotherhood of RR Tr.* v *Jacksonville Tenn. Co.*, 394 US 369, 377 (1969); *BLE* v *UTU*, 471 F2d 8 (6th Cir., 1972). Because the RLA is the exclusive remedy, *Andrews* v *L & N Ry.*, 406 US 320 (1972) and the National Labor Relations Act specifically exempts railway workers, *Brotherhood of RR. Tr., supra,* a claim against the Union is not possible herein. The case cited by petitioner, *Pyzynski* v *NY Central*, 421 F2d 854 (2d Cir., 1970) does not govern the 6th Circuit, and is of questionable vitality following *Andrews, supra.*

Further, the underpinnings of the duty of fair representation is the fact that in non-railroad industry the Union is the employee's exclusive agent. *Vaca* v *Sipes*, 386 US 1971 (1967). In minor disputes under the RLA the Union is not the exclusive agent.

In *LaFontaine,* respondent insisted that he get notice and present his own claim because he was dissatisfied with his Union representation. The denial of said right clearly prejudiced respondent.

The Statute requires notice be given to grievants. It was not. Certiorari is unnecessary.

C. Petitioners argument that the Sixth Circuit decisions below, and in *Cole* v *Erie-Lackawanna Ry. Co., supra,* misapplies this Court's opinion in *Burley* v *Elgin, A. J. & E. R. Co., (I), supra,* and the Seventh Circuit's opinion in *Kotakis* v *Elgin, J. & E. R. Co., infra,* is without merit.

Petitioner argues that, assuming the provision of §153, (First)(j) apply to public law boards, respondent received legally sufficient notice through his union. Clearly the Sixth Circuit disagreed.

As the Court stated in *Burley (I), supra* at 712, the threshold question is whether or not the Union was authorized to *represent* the employee *before the board* in question. To the extent the employee expressly authorizes the Union to *represent* him or her, no notice need be given to the employee directly. In effect notice has been given to the employee's authorized agent. Likewise in those cases where the employee has expressly repudiated the Union's authorization, formal notice must be served on the employee if the board's decision is to be final and binding. The problem in this area of the law comes about because, in most cases, there is neither an explicit grant of authorization nor an explicit repudiation of such authorization. In *Burley (I), supra,* 738-739, the Court indicated in footnote 38 that the question of authorization could be resolved by reference to the "common law" rules of agency. However, in *Burley (II), supra,* the Court on rehearing seemingly developed an approach more specifically de-

signed to deal with the peculiarities of the railroad industry. While maintaining that the question of authorization was ultimately a fact question to be resolved on a case by case basis, the Court in *Burley (I), supra* at 664, held that the union was presumed to appear before the Board with full authority to represent the employee. Further that the individual employee was obligated to act affirmatively to dispel that authorization, *Burley (II), supra* at 665, n. 7. The Court imposed this obligation on the employee to act affirmatively because it was convinced that the employee would have knowledge of the proceedings and could act to assert his right to appear personally if he so desired.

> ". . . there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted or, if they fail that proceedings are pending before the Board to dispose of it." *Burley (II), supra* at 666.

In footnote 9 the Court explained that it assumed knowledge on the part of the employee because the act guaranteed that the employee would receive "due notice". Without defining due notice, the Court held that it required "at least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." *Burley (II), supra* at 666, n. 9.

What is clear is that, as a minimum, the individual employee must have sufficient information to allow him to assert his rights before the board if he chooses to do so.

This minimal due process safeguard of actual notice is especially important in the context of the public law boards.

As noted above, only the union can submit cases to public law boards, whereas either the union or the employer could file the claim with the NRAB.

It is the employee's ability to go to the NRAB by himself or with counsel of his own choosing which raises the presumption of authorization when the employee requests that his union make the submission. *Burley (II), supra* at 663-4. This same choice does not exist with the public law boards. In this situation the employee faces the alternative of submitting his claim to the NRAB and waiting up to five (5) years for a decision or asking his union to submit his case to a public law board. In this context, it is hardly fair to presume that the employee has voluntarily waived his right to appear personally.

This is not the only difference between the NRAB and the public law boards. An even more important reason to insist on notice of the hearing in cases before the public law board stems from the difference in the character of the two boards. The NRAB is a permanent institution with a permanent location and address. Public law boards, of which there are 459, c.f. *Seidenberg, supra,* p. 232 are the exact opposite. They constantly come into and go out of existence. They have no permanent offices or addresses to which mail can be sent or at which personal appearances can be made.

If we are to imply authorization from the employees inaction (or, more accurately, if we are to say that the presumption of the union's authorization is not rebutted because of the failure of the employee to act affirmatively to rebut it), we must be satisfied that the employee's inaction was his own fault.

In cases before the public law boards it is doubly certain that we cannot imply authorization from inaction without proof that the employee, *at least,* had actual notice which would have allowed him to act affirmatively if he chose to. *Burley (II), supra* at 666, n. 9. In cases before the public law boards, it is clear that the employee could never

act to assert his right of appearance without some indication as to where the hearing would be held or where he might go to insure that he be given notice.

Petitioner alleges — that, the Sixth Circuit's opinion in *Cole, supra* departs from *Burley, supra* and is in conflict with *Kotakis* v *Elgin J. & E. Ry.*, 520 F.2d 570 (7th Cir.) cert. den. 423 US 1016 (1975).

In fact, there is no conflict, nor is there any basis for certiorari in this case.

In *Kotakis, supra,* the Court without an analysis, and in dicta, stated that the record reflected that the employee authorized the union to represent him *before the NRAB, Kotakis, supra* at p. 576. Obviously, where such authorization is contained in the record, the notice question, as posed above, need not be addressed.

In *Cole,* the only authorization in the record, was the authorization to handle the grievance and submit it to the public law board if necessary. In that situation, the Court held that the notice requirement was satisfied by *actual* notice of the hearing for a sufficient period to allow the employee to act upon the notice, *Cole, supra,* p. 534. What is important in *Cole* is the holding that when the Union is authorized to submit a grievance, the decision of the board is binding on the individual employee, absent formal notice, so long as he has actual notice of "the hearing for a sufficient period prior thereto to permit the employee" to act on such notice, *Ibid.*

It is clear that *Cole* is not in conflict with *Burley.* What is essential in both cases is that the employee is equipped with sufficient knowledge to assert his right to personally appear if he wishes to do so. Cf. *Burley (II), supra* at 666, n. 9; and *Cole, supra* at 534. Moreover, this petition for certiorari is addressed to this particular case.

In the instant case there can be no question that respondent did not wish to waive his right to represent himself before the public law board. This alone demarcates this case from *Kotakis.* This alone requires that the board's decision be set aside because he was not given notice of the hearing.

There is absolutely nothing in this record which would indicate that respondent's right to represent himself which this Court preserved in *Burley (II), supra,* was adequately protected.

Respondent chose to go to the public law board rather than wait an additional three years for a decision before the NRAB. As a result he had to ask his union to submit his case. Such a request does not constitute authorization to receive notice, or act on the employee's behalf. See *Burley (II), supra* at 447, 746, n. 3. He made it clear to the union that he wanted to represent himself. The union agreed. He received no formal or actual notice of the hearing, nor did he have any actual or formal notice of which public law board had docketed his case (there are approximately 450 public law boards which periodically come into and go out of existence as they complete their dockets); as a result respondent could not exercise his right to appear personally.

Given these facts, we must conclude that Mr. LaFontaine, respondent herein, did not expressly or implicitly authorize the union to represent him before the public law board.

Petitioner has raised the alarm that *Cole, supra,* and the instant case portends disaster for the public law boards. In fact the test of *Cole,* actual notice, can easily be met if the carriers, unions and public law boards wish to do so. A simple letter would be one of many ways, that such notice could be given.

In reality, Petitioner's cries of alarm reveal their real objection to the notice requirements of *Cole* (and of *Burley)*. Petitioners do not wish to give any notice of the hearing because they wish to exclude employees from the hearing. Their contention that *Burley* does away with the notice provision is tantamount to their original argument that the union is the exclusive representative in cases before the public law boards.

Petitioner's second ground for certiorari is without merit. The *Burley* cases were applied correctly by the Sixth Circuit. There is no conflict with the Seventh.

CONCLUSION

For the reasons sttaed herein certiorari should be denied.

Respectfully submitted,

REOSTI & PAPAKHIAN

RONALD REOSTI (P 19368)

658 Pallister
Detroit, MI 48202
(313) 875-9800

APPENDIX

45 U.S.C. 153 (Second)

System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such

a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of

disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub.L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub.L. 91-234, §§ 1-6, 84 Stat. 199, 200.